

Supreme Court U.S.  
FILED

05-532 OCT 24 2005

No. 05-

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

CRAIG THOMASIAN,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**PETITION FOR A WRIT OF CERTIORARI**

**RICHARD E. GARDINER\***

Suite 404

10560 Main Street

Fairfax, Virginia 22030

(703) 352-7276

*Counsel for Petitioner*

*\*Counsel of Record*

## QUESTIONS PRESENTED

The ultimate issue is whether a Striker-12 shotgun is a "destructive device" within the meaning of 26 U.S.C. § 5845(f)(2) (defining "destructive device" to include "a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes"). The determination of this issue turns upon two subsidiary legal issues.

1) Whether the phrase "which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes" in § 5845(f)(2) modifies only "shotgun shell" or whether it modifies both "shotgun" and "shotgun shell"?

2) Whether, in § 5845(f)(2), the phrase "generally recognized as" delegates legislative authority in violation of Art. I, § 1 of the Constitution?

# TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
OPINION BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL PROVISION .....	1
STATUTE .....	1
STATEMENT OF THE CASE .....	2
(i) Proceedings in the Courts Below .....	2
(ii) Statement of Facts .....	4
ARGUMENT .....	4
I. THE COURT OF APPEALS' REJECTION OF THE DOCTRINE OF THE LAST ANTECEDENT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS .....	4
II. THE COURT OF APPEALS' DECISION THAT THE PHRASE "GENERALLY RECOGNIZED AS" IN § 5845(f)(2) IS NOT AN	

UNCONSTITUTIONAL DELEGATION CONFLICTS WITH THIS COURT'S DECISIONS .....	23
---	----

CONCLUSION .....	30
------------------	----

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit .....	1a
--	----

Opinion of the United States District Court for the District of Oregon .....	6a
---	----

## TABLE OF AUTHORITIES

CASES	Page
<i>Abourezk v. Reagan</i> , 785 F.2d 1043 (D.C. Cir. 1986) .....	20
<i>A.L.A. Schechter Poultry Corp. et al.</i> <i>v. United States</i> , 295 U.S. 495 (1937) .....	29
<i>Chevron, U.S.A. v. Natural Resources</i> <i>Defense Council, Inc.</i> , 467 U.S. 837 (1984) .....	5
<i>Demko v. United States</i> , 216 F.3d 1049 (Fed. Cir. 2000) .....	5, 11
<i>District 6, United Mine Workers of America</i> <i>v. United States Department of the Interior</i> , 562 F.2d 1260 (D.C. Cir. 1977) .....	6
<i>Elliot Coal Mining Co. v. Director</i> , <i>Office of Workers Compensation Programs</i> , 17 F.3d 616 (3d Cir. 1994) .....	9, 10
<i>F. T. C. v. Mandel Brothers</i> , 359 U.S. 385 (1959) .....	6
<i>Gould v. Gould</i> , 245 U.S. 151 (1917) .....	29
<i>Lichter v. United States</i> , 334 U.S. 742 (1948) .....	25, 28, 29

<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943) .....	25, 29
<i>National Coalition for Students v. Allen</i> , 152 F.3d 283 (4th Cir. 1998) .....	10
<i>NLRB v. United Food &amp; Com'l Wkrs Union</i> , 484 U.S. 112 (1987) .....	11
<i>National Surety Corp. v. Midland Bank</i> , 551 F.2d 21 (3 <sup>rd</sup> Cir. 1977) .....	8, 10, 11
<i>Rodriguez v. United States</i> , 480 U.S. 522 (1987) .....	12, 13
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U.S. 384 (1951) .....	21
<i>Sonzinsky v. United States</i> , 300 U.S. 506 (1937) .....	28
<i>Sorrells v. United States</i> , 287 U.S. 435 (1932) .....	14
<i>Squillacote v. United States</i> , 747 F.2d 432 (7 <sup>th</sup> Cir. 1984) .....	13, 14
<i>Touby v. United States</i> , 500 U.S. 160 (1991) .....	23, 24, 25
<i>United States ex rel. Santarelli v. Hughes</i> , 116 F.2d 613 (3 <sup>rd</sup> Cir. 1940) .....	8, 10

<i>Whitman v. American Trucking Assns., Inc.</i> , 321 U.S. 457 (2001) .....	25
---	----

<i>Yakus v. United States</i> , 321 U.S. 414 (1944) .....	25, 26, 28, 29
--	----------------

## CONSTITUTION

U.S. Const., Art. I, § 1 .....	1, 23
--------------------------------	-------

## STATUTES

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197 (1968) .....	18
Pub. L. 90-618, 82 Stat. 1213 (1968) .....	22
26 U.S.C. § 5845(f)(2) .....	2, 3, 4
26 U.S.C. § 5861(d) .....	2

## LEGISLATIVE MATERIALS

Proposed Amendments to the National Firearms Act and the Federal Firearms Act: Hearings Before the Committee on Ways and Means; House of Representatives, 89th Cong., 1st Sess. (1965) .....	15
S. Rep. 1591, 89th Cong. 2d Sess. (1965) .....	15, 16



S. Rep. 1592, 89th Cong. 2d Sess. (1965) .....	16
S. Rep. 1866, 89th Cong., 2d Sess. (1965) .....	16
S. Rep. 1097, 90th Cong., 2d Sess. (1968) .....	17
S. Rep. 1501, 90th Cong., 2d Sess. (1968) .....	14, 19, 20
114 Cong. Rec. ....	<i>passim</i>

#### **OTHER AUTHORITIES**

ATF Rul. 94-2 .....	28
---------------------	----



## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of forfeiture was published at 416 F.3d 977 (9<sup>th</sup> Cir. 2005) and is reproduced in the Appendix ("App.") at App. 1a. The Opinion of the United States District Court for the District of Oregon forfeiting the property was unpublished and is reproduced at App. 6a.

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of forfeiture on July 26, 2005. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION

U.S. Const., Art. I, § 1 states in part: "All legislative powers herein granted shall be vested in a Congress of the United States . . . ."

## STATUTE

26 U.S.C. § 5845(f)(2) provides in pertinent part that a "destructive device" is:

any type of weapon by whatever name known which will . . . expel a projectile by the action of an explosive . . . the barrel . . . of which ha[s] a bore of more than one-half inch in diameter, except a *shotgun* or *shotgun shell* which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes . . . . (emphasis added).

## **STATEMENT OF THE CASE**

### **(i) Proceedings in the Courts Below**

On or about October 12, 2002, a special agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives of the United States Department of Justice ("ATF") seized the Sentinel Arms Striker-12 shotgun, serial no. 001725, from Craig Thomasian in The Dalles, Oregon, for violation of 26 U.S.C. § 5861(d). In ATF's view, Thomasian's possession of the Striker-12 was unlawful because, on March 1, 1994, ATF issued ATF Ruling 94-2, which classified the Striker-12 shotgun as a "destructive device" as defined in 26 U.S.C. § 5845(f) because it is a shotgun with a bore of more than one-half inch in diameter which is not generally recognized as particularly suitable for sporting purposes.

Following the seizure of the Striker-12, administrative forfeiture proceedings were commenced by ATF. Thomasian timely filed a claim and a bond for costs with ATF, thereby transferring jurisdiction of the forfeiture proceeding to the United States District Court.

A complaint *in rem* for forfeiture was filed on July 1, 2003. On August 22, 2003, Thomasian, acting *pro se*, filed a claim with the district court. On September 17, 2003, Thomasian, by counsel, filed a motion under Rule 12(b)(6), Fed.R.Civ.Pro., to dismiss the complaint for failure to state a claim upon which relief can be granted. By order of October 21, 2003, the district court denied the motion. Because Thomasian's local counsel did not provide below-signed counsel a copy of the court's Order, below-signed counsel was prevented from timely filing an answer. The United States thus filed a motion to strike Thomasian's claim on or about

November 5, 2003.<sup>1</sup> The district court permitted Thomasian to file a response to the Government's motion to strike, which was filed on or about December 18, 2003, as was an answer. By order of January 22, 2004, the district court granted the Government's motion to strike. On March 4, 2004, the Government filed a motion requesting entry of a default judgment, which Thomasian opposed. Although the district court entered a default judgment on March 13, 2004, it set aside that judgment by order of March 26, 2004. On April 5, 2004, the Government filed a motion for judgment on the pleadings as Thomasian stipulated to the facts as alleged in the complaint. The district court, by order of April 13, 2004, denied the Government's motion for default judgment as moot and granted the Government's motion for judgment on the pleadings. On May 17, 2004, the district court entered a final judgment of forfeiture.

The Ninth Circuit affirmed the judgment of forfeiture by published opinion of July 26, 2005, holding that the Striker-12 was a "destructive device" within the meaning of 26 U.S.C. § 5845(f)(2) because "the phrase 'generally recognized as particularly suitable for sporting purposes,' modifies 'shotgun,' as well as 'shotgun shell.'" 416 F.3d at 979. Moreover, the court of appeals held that the phrase "generally recognized as suitable for sporting purposes" contained in 26 U.S.C. § 5845(f)(2) did not unconstitutionally delegate legislative authority to ATF. 416 F.3d at 979-80.

---

<sup>1</sup> Although not stated in the title of the motion, the Government also requested the district court for a default judgment.

### Statement of Facts

On March 1, 1994, ATF issued ATF Ruling 94-2, which classified the Striker-12 shotgun as a "destructive device" as defined in 26 U.S.C. § 5845(f) because, according to ATF, the Striker-12 is a shotgun with a bore of more than one-half inch in diameter which is not generally recognized as particularly suitable for sporting purposes. On or about October 12, 2002, an ATF agent seized the Sentinel Arms Striker-12 shotgun, serial no. 001725, from Craig Thomasian.

### ARGUMENT

#### I.

#### THE COURT OF APPEALS' REJECTION OF THE DOCTRINE OF THE LAST ANTECEDENT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

1) 26 U.S.C. § 5845(f)(2) provides in pertinent part:

(2) any type of weapon by whatever name known which will . . . expel a projectile by the action of an explosive . . . the barrel . . . of which ha[s] a bore of more than one-half inch in diameter, except a *shotgun* or *shotgun shell* which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes . . . . (emphasis added).

The initial issue decided by the court of appeals was whether the underscored language modifies only "shotgun shell" or whether it modifies both "shotgun" and "shotgun shell." If the underscored language modifies only "shotgun shell" and not "shotgun," all shotguns are excluded from the